

ROBERT M. DRASKOVICH, ESQ.
Nevada Bar No. 6275
THE DRASKOVICH LAW GROUP, CHTD.
815 S. Casino Center Blvd.
Las Vegas, Nevada 89101
Telephone: (702) 474-4222
Attorney for Defendant

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,
Plaintiff,
vs.

PHILLIP D. HURBACE, LARRY
ANTHONY MCDANIEL, and SYLVIANE
DELLA WHITMORE a/k/a: "Sylviane
Cordova",

Defendants.

Case No.: 2:17-CR-00110-APG-DJA

**Defendant Sylvaine Della Whitmore's Motion
for Deposition**

[Fed. R. Crim. P. 15]

COMES NOW the Defendant, SYLVIANE DELLA WHITMORE ("Ms. Whitmore"), by and through her attorney of record, Robert M. Draskovich, Esq., of The Draskovich Law Group, Chtd., respectfully submits *Defendant Sylvaine Della Whitmore's Motion for Deposition*. This Motion is based upon the attached Memorandum of Points and Authorities, the records and files of this case and any evidence and/or argument adduced at a hearing on this matter.

DATED this 20th day of October, 2020.

/s/ Robert M. Draskovich
By: _____
Robert M. Draskovich, Esq. (6275)
Attorney for Defendant

MEMORANDUM OF POINTS AND AUTHORITIES

Trial is currently set for February 22, 2021. Ms. Whitmore has witnesses she would like to have deposed in order to preserve their testimony for trial. During the pendency of this case, one witness Ms. Whitmore planned to call has passed away. Given the current pandemic and the witnesses ages and questionable health, Ms. Whitmore hereby requests that this Honorable Court grant her request for depositions. The following are the witnesses Ms. Whitmore requests to have deposed: Linda Brown. Ms. Brown is 77 years old and has been on a ventilator twice and has had pneumonia and lung related health issues; and Laurie Engel. Ms. Engel is 89 years old and is beginning to lose her memory. Both witnesses are relevant to her defense. Both may become “unavailable.”

I. LEGAL STANDARD

Rule 15(a)(1) of the Federal Rules of Criminal Procedure provides that:

A party may move that a prospective witness be deposed in order to preserve testimony for trial. The court may grant the motion because of exceptional circumstances and in the interest of justice....

The district court retains broad discretion in granting a Rule 15(a) motion, and considers the particular circumstances of each case to determine whether the “exceptional circumstances” requirement has been satisfied.” *United States v. Omene*, 143 F.3d 1167, 1170 (9th Cir. 1998) (quoting *United States v. Farfan–Carreon*, 935 F.2d 678, 679 (5th Cir.1991)). Rule 15

II. ARGUMENT

Rule 15 “contemplates a party taking the deposition of only his own witnesses, and only if the witness may be unable to attend trial.” *United States v. Fei Ye*, 436 F.3d 1117, 1123 (9th Cir. 2006) (citing *United States v. Rich*, 580 F.2d 929, 934 (9th Cir. 1978) and *United States v. Cutler*, 806 F.2d 933, 936 (9th Cir. 1986)). In addition, Rule 15(a) does not require a showing that the witness is unavailable for trial or that the evidence is material or favorable (although we believe it

1 is both). *Omene*, 143 F.3d at 1170. The witness's unavailability must be established before a party
 2 may use the deposition at trial, not before the party may depose a witness. *Id.* "Rule 15(a) only
 3 requires that the trial court find that due to exceptional circumstances it is in the interest of justice
 4 that the testimony of a prospective witness be taken and preserved for possible use at trial." *Id.* The
 5 Federal Rules of Evidence generally condition the admissibility of deposition testimony, in the
 6 absence of trial testimony, on the unavailability of the witness. *See* Fed.R.Evid. 804(b). But, "[i]t
 7 would be unreasonable and undesirable to require the [a party] to assert with certainty that a witness
 8 will be unavailable for trial months ahead of time, simply to obtain authorization to take his
 9 deposition." *United States v. Sines*, 761 F.2d 1434, 1439 (9th Cir. 1985).

11 **III. CONCLUSION**

12 Based on these Points and Authorities, Ms. Whitmore respectfully requests that this Motion
 13 be granted.

14 DATED this 20th day of October, 2020.

15 /s/ Robert M. Draskovich

16 By: _____

17 Robert M. Draskovich, Esq.
 18 Nevada Bar No. 6275
 19 815 S. Casino Center Blvd.
 20 Las Vegas, Nevada 89101

21 **IT IS SO ORDERED.**

22 DATED: November 4, 2020.

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24 _____
 25 DANIEL J. ALBREGTS
 26 UNITED STATES MAGISTRATE JUDGE
 27
 28

CERTIFICATE OF SERVICE

I, Erika W. Magaña, declare: I am a citizen of the United States and employed in Clark County, Nevada. I am over the age of eighteen years and not a party to the above-titled action. My business address is 815 S. Casino Center Blvd., Las Vegas, Nevada 89101. On October 20, 2020, I served a copy of the following document: **Defendant Sylvaine Della Whitmore's Motion for Deposition**, via CM/ECF to the persons listed below:

Richard Anthony Lopez
Assistant United States Attorney
richard.lopez2@usdoj.gov

DATED this 20th day of October, 2020.

/s/ ERIKA W. MAGAÑA

An Employee of The Draskovich Law Group